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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GRUBBS,

Defendant and Appellant.

G042199

(Super. Ct. No. 07WF0402)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Jeffrey J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

* * *

THE COURT:^{*}

Appellant Michael Grubbs was sentenced to seven years in prison after he was convicted of one count possession of a controlled substance and one count possession of controlled substance paraphernalia, and it was found he had suffered four prison priors. The court suspended imposition of sentence and placed Grubbs on probation subject to certain conditions. Eighteen months later, Grubbs was arrested and pled guilty to driving under the influence of alcohol. At a probation violation hearing Grubbs pleaded for continued leniency and another chance. The court refused; it revoked probation and imposed a seven-year sentence.

On appeal, Grubbs argues the trial court deprived him of due process and violated his right to a fair and impartial hearing because it never actually considered whether to continue him on probation, that it was committed to denying any request for probation no matter what the record showed. Citing *Gonzales v. Johnson* (N.D.Tex. 1997) 994 F.Supp. 759, he asserts the violation of his rights requires reversal and a new hearing before a different judge. We disagree. The record as a whole shows the trial court considered the appropriate criteria and determined continued probation was inappropriate under the circumstances.

I

A court may revoke probation if the probationer has violated the terms of probation. (Pen. Code, § 1203.2.) “The fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred and, if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty. [Citation.]” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348; see *People v. Monette* (1994) 25 Cal.App.4th 1572, 1575 [role of court in

^{*} Before Sills, P. J., Rylaarsdam, J., and Ikola, J.

probation violation hearing is to determine “whether he can be safely allowed to remain in society”].)

Grubbs argues the court here never actually considered whether it would be appropriate to allow him to remain on probation. He points to the court’s comments at the sentencing hearing where it told him he was being given one last chance, and that if he violated probation the court would sentence him to the full seven years. He then points to the court’s comments at the probation violation hearing where the court reminded Grubbs as to what it had told him at the sentencing hearing and, based solely on what he asserts was its “promise” to send him to prison if he violated probation, revoked his probation and imposed sentence. Grubbs insists these statements demonstrate the court never considered allowing him to remain on probation but imposed sentence solely because it had told Grubbs it would.

In making his argument he relies heavily on the Texas federal district court’s opinion in *Gonzalez*. In *Gonzalez*, the sentencing court promised the defendant he would go to prison if he violated probation and, when the defendant was found to have violated the terms of probation, it revoked probation and sentenced him to three life terms. (*Gonzalez v. Johnson, supra*, 994 F.Supp. at p. 762.) Grubbs characterizes the holding in that case as standing for the proposition that a trial court’s “promise to impose prison regardless of the circumstances of a probation violation violates” the principle that due process requires a hearing before an impartial decision-maker.

But it is clear from a full reading of the record that the trial court did not violate Grubbs’s rights.¹

II

At the sentencing hearing the trial court reminded Grubbs that he had a lengthy criminal history, including having served time in prison on four separate

¹ The Attorney General argues Grubbs waived this challenge by not raising it below. We find no waiver here.

occasions, and that “most of it is drug related.” It reminded him he had failed probation before, several times. But despite 30 years of crime, the court was willing to take a chance on him. It acknowledged that Grubbs needed treatment and told him that as the court “sat through the trial, [] something inside me tells me that you have some good that you can do.” Grubbs also acknowledged he needed treatment, and indicated he was “willing to go through it.” The court observed that the probation report did not believe he was sincere about pursuing the treatment options, but the court did. “[T]o me it is impressive [¶] I am going to give you the opportunity.” It then warned him, though, that, “If you don’t take advantage of it, I mean I am going to fashion a sentence to where if you are back in front of me, I will give you every possible day available in state prison.”

The trial court, moreover, took a specific interest in helping Grubbs succeed on probation. It held several progress review hearings at which it reviewed the probation department’s report about how he was faring. But at the last review hearing Grubbs was dishonest with the court. The hearing was nine days after he was arrested for driving while under the influence. The trial court obviously knew nothing about it, commenting that, “You’re still making me [] look good [and it] looks here like according to the probation report everything is satisfactory.” Although the driving under the influence case had not yet been filed, Grubbs not only made no mention of it, he asked the court if he could “get off” probation so he and his fiancée could move to Kansas. The court indicated it was not ready to terminate probation but was willing to look into possibly relieving the probation officer from supervision. Not satisfied, Grubbs again asked, “What is the possibility that I might be able to get off probation?” The court said “slim at this point in time.” Pushed again, the court responded, “I will talk to your probation. I will keep an open mind and I need to get some more facts as to what you’re going to do and what else is going to happen to it with parole. So I will let you come back in two or three weeks and hopefully get some more information.”

At the follow-up hearing two weeks later, the trial court still knew nothing about Grubbs's arrest. The court was told the probation department was unwilling "to relieve supervision" of Grubbs but that it was "agreeable to transferring" his probation to Kansas. Anxious to start the process, Grubbs asked if he could "go to work on that today or something." The court obliged. "I will give you a minute order saying the court would be agreeable to having your probation transferred to the State of Kansas based on the P.O.'s recommendation. Take that minute order, go down to probation, get started on that."

When Grubbs came back a couple of months later, it was for the probation violation hearing. He admitted the violation; he told the court he pled guilty to the new charges and was sentenced to one year in jail. Counsel argued Grubbs was truly sorry for his latest offense. "He's in recovery. He is committed to recovery." Counsel explained it was Grubbs's intention to move to Kansas before his arrest, and he apologized that Grubbs "didn't disclose the D.U.I. arrest," but suggested "[t]he case had not been filed at that point. He certainly regrets that, but he just wants the court to know he is still committed to his recovery. And after he serves his year on the D.U.I. offense he would like another opportunity on probation to complete that and go forward with his recovery and with the rest of his life." Grubbs then spoke in his own behalf. He confessed he "over drank" that night and was very sorry for what had happened. The court stated that, "I believe you. I think you're genuinely remorseful with respect to that."

The court then explained why it was revoking probation. "I am sorry that you put me in this position because I like you. I truly do. And I meant what I said when I sentenced you on December 7th, a lot of good things in your background, 55 years old, I believe, and potential to do a lot of good things. But I was very adamant and clear with you what my conditions were. You didn't have the flexibility to go out and get drunk [on] New Year's and get behind a wheel without a license and commit a D.U.I. and blood alcohol greater than .08. You just didn't have that flexibility. You had—it's a zero

tolerance with me. I told you. I was up front with you.”

When Grubbs said he did have a license that night, the court said: “Well, you shouldn’t have then based on everything that I saw. The fact that you were on felony probation to me and went out and got drunk and got behind the wheel of a car, license or no license, is really a shame. And not only that, you came in here on January 23rd knowing full well that you had been arrested with a D.U.I. and did not even—did not inform your attorney, did not disclose anything to me. [¶] You asked me to transfer your probation to Kansas and I got the whole thing going for you to try to do it for you. You’re telling me this knowing full well you have been arrested for a D.U.I.” Grubbs interposed, “I did not think that the D.U.I. was the magnitude that it was. Just take some classes. I didn’t know.” Faced with the shallowness of his interjection, the court responded: “Well, you’re just digging yourself a deeper hole, Mr. Grubbs. All right. I have everything I need to hear.”

Although the court referenced its statements at the original hearing and then revoked probation, that does not mean the court was inappropriately predisposed to that course without considering whether it was appropriate to continue probation. The record, when viewed as a whole, shows the court allowed Grubbs and his counsel to make the case for continued probation and that it considered their arguments. The record also shows Grubbs had an almost impossible case to make. The court had granted him probation in the first place almost as a gift. His track record in the past had been abysmal and his crime here was right in line with his past ones. The trial court had tried to help him in many ways, including issuing a minute order that indicated the court was agreeable to transferring probation supervision to Kansas. In the end, however, Grubbs lied to the court. He had violated probation, and he intentionally kept that information from the court at the progress review hearing in the hopes the court would terminate his probation and let him move to Kansas before it knew about the violation. When confronted with the reality of his actions at the hearing, Grubbs tried to minimize his

conduct.

At a probation violation hearing, the trial court must consider whether it is appropriate to allow the probationer to continue in society. The breadth of that consideration, however, depends on many factors and must be viewed on a case-by-case basis. Here, the trial court had for more than eighteen months given Grubbs every available break. Its reward was a probationer who lied. Under these facts, the court properly revoked probation and imposed sentence.

III

The judgment is affirmed.